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No. 10-115

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

GERTRUDE CORETTA FENNELL HAMILTON,
Petitioner,

v.

DAYCO PRODUCTS, LLC AND MARK IV INDUSTRIES,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR REHEARING

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OCTOBER 22, 2010

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

"The caption of the case contains the names of all the parties. However, the Corporate Disclosure Statement submitted by Petitioner is incorrect and incomplete.

1. Mark IV Global Holding Corp., not Holdings, is the holding company for Mark IV Industries.

2. Mark IV Global Holding Corp. is held by Mark IV LLC.

3. Mark IV LLC is held by a consortium of equity holders." This quote was issued by Respondents.

Reply clarification needed: Please reference RESPONSE BRIEF OF APPELLEES, IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, under No. 09-1999; "CORPORATE DISCLOSURE STATEMENT, Mark IV Industries, Inc. is the parent company for Dayco Products, LLC. Mark IV Industries, Inc. is held by Mark IV Global Holding Corp. No publicly held corporation owns 10% or more of the stock of Mark IV Industries, Inc. or Dayco Products, LLC."

Just days before the scheduled jury selection an Automatic Bankruptcy Stay was issued halting Petitioner's efforts for justice, the reconstruction process under chapter 11 appears to be over, after only six months, **Mark IV Industries** already emerged from bankruptcy; to now be protected under **LLC.**

No publicly held corporation owns stock in this Petitioner.

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PETITION FOR REHEARING

Pursuant to Supreme Court **Rule 44.1** Petitioner Gertrude Coretta Fennell Hamilton respectfully petitions the Court for rehearing of its judgment and decision issued on October 04, 2010.

GROUNDS FOR REHEARING

The Court did not address or decide questions 2, 3, 4, or 5 presented in the Petition for Writ of Certiorari. Rehearing is warranted because resolution of these unaddressed issues has important, outcome-determinative implications for the decision with respect to the lawfulness of the policy and practices at issue in this case and for future cases in which similar questions will arise.

I. Question number two of the "Writ of Certiorari" is listed below:

2. Whether the Court of Appeals erred by dismissing for lack of jurisdiction appeals from the underlying judgment without applying strict review de novo to the district court's findings because the claims contained many adverse disability and employment actions with violations to constitutional rights? Civil Rights Act Title VII, 42 USC § 200d or 42 USC § 1981.

Please review Bankruptcy law with Title VII Standard of Review verses what happen to this Petitioner; on **05/21/2009** two days after **Entry # 91** one will find the district court docket exhibits two new entries appeared while the case was in "STAY" under Title VII discrimination. Please reference Federal Rule of Civil Procedure **Rule 62**.[1] Petitioner did not receive **10 days** after

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[1]**Rule 62**: **(a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accounts**. Except as stated herein, no execution shall issue a judgment nor shall proceedings be taken for its enforcement until the expiration of **10 days** after its entry. Unless

the notification STAY entry on 05/19/2009.

Please reference Chapter 11, Case No. 09-12795 (SMB) jointly Administered, Unsecured-Claim Number 916 and 917, Response with Objection Dated: 5/7/2010 Petitioner submitted "Proof of Claim" requesting $33,000,000.00 on 09-12795 and 09-12803 because of Wrongful Termination and or Willful Discrimination the claims were stamped Filed/ Received Aug 18, 2009 and prior to the deadline of August 21, 2009 as the date by which proofs of claim must be filed, as required in the **Order** lifting STAY of 11 U.S.C. §362 issued on **July 17, 2009**; no objections were filed.

Please review some of these adverse actions under Civil Rights Act Title VII, 42 USC § 200d or 42 USC § 1981. Petitioner requested reasonable accommodations while working for the Respondents: "The Defendant placed the plaintiff on leave, at the leave when she voiced concerns about the surgery recovery time going to be 26 weeks. Now the Defendant attempts to hide behind the facts that they have presented in the light most favorable to them. The fact that they may have given her people to assist her with the position but failed to provide her a less than 100$ head set and the fact that they terminated her legitimately under their policies. Each of these arguments is disingenuous and attempts to escape the facts that are prevalent and lead the Plaintiff to the path of a trial before a jury of her peers." Information can be found in: Entry No. 74, Page 11 of 13.

"The Plaintiff has presented a genuine issue of material fact as to if she is a qualified individual with a disability and whether the Defendant perceived her as disabled. As set forth in the Plaintiff's argument the Plaintiff was a qualified individual with a disability or a

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otherwise ordered by the court, an interlocutory or final judgment in act for an injunction or in a receivership action, or a judgment... in an action for infringement of letters patent, shall not be stayed during the period.... (b) Stay on Motion for New Trail or for judgment...pursuant to **Rule 59**, or of a motion for relief from judgment or order made pursuant to **Rule 60**, ..."

perceived disability." Please Ref: Entry No. 74, Pages 10 of 13.

"The Defendant also arbitrary terminated the Plaintiff's workers' compensation benefits three weeks prior to her termination. Therefore the Plaintiff had a reduced income due to the Defendant's arbitrary stopping of her workers' compensation benefits and the fact that they delayed her Long Term Disability Application after many requests after she was placed on workers' compensation medical leave." Ref: No 74, Page 12 of 13.

Reasonable accommodations ignored.[2] The Respondents knew a disability existed because she asked for an accommodation and they sent her on LOA due to disability.

In the case of *Arbaugh v. Y & H Corp* it is argued that; "*Civil Rights Act of 1964 § 706(f) (3), 42 U.S.C.A. § 2000 e (b) (2005)* does not affect a court's determination of subject-matter jurisdiction. Rather, *Arbaugh* argues that the *Civil Rights Act of 1964 § 706(f) (3), 42 U.S.C.A. § 2000e-5(f) (3) (2005)* establishes subject-matter jurisdiction in the Federal Courts. "Thus, *Arbaugh* argues that if a plaintiff claims that defendant's actions violated Title VII, Jurisdiction is established in the Federal courts, without looking any further than section 706 (f) (3) to establish jurisdiction" in 28 U.S.C. § 1331.

Please review a New Authority: *HARDT v. RELIANCE*

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[2] **Reasonable accommodation**: The term "reasonable accommodation" may include: Making... an employer must provide reasonable accommodation to an employee with an obvious disability even if the employee never requests an accommodation, the federal court of appeals in New York has ruled. ***Brady v. Wal-Mart Stores, Inc., No. 06-5486-cv*** **(2d Cir. July 2, 2008)**. Because the Americans with Disabilities Act ("ADA") required employers to make accommodations for "known" disabilities is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled," ; **is this a split in circuits**.

STANDARD LIFE INSURANCE CO. – *Certiorari to the US Court of appeals for the fourth Circuit, No. 09-448,* Decided May 24, 2010. That case is much like this one. Petitioner Hamilton requested Long-Term-Disability benefits under the employer's benefit plan that she paid her premiums for many years, requested several times in March 2006. The employer controlled the filing process. Petitioner was eligible for LTD benefits on **March 16, 2006** (26 weeks) after the employer sent her out on Workers ' Compensation Leave involuntarily and without the approval from any doctor, or Workers Comp. The district court Order Entry No. 82, Page 3 of 17, in C.A. No. 2:07-2782-PMD-RSC even notes "she also qualified for Long-Term Disability benefits from Aetna Insurance, which were made retroactive to March 15, 2006." However, the employer would not file until **August 17, 2006** as confirmed by Aetna Insurance, Co. in the Motion for Reconsideration; Doc. No. 96-4, pg. 2 of 2; discriminatory action against the Petitioner before terminating her.

The Respondent's claimed in Entry No. 54-10, Page 5 of 13; as the reason for Termination: "Employment Reached the 26 week limit for leave of absence. Employee was put on medical leave of absence on 9/15/05 and has been on continious leave until present", dated 6/29/06." The Leave of Absence on, Doc. # 54-10, Page 4 of 13 shows the Reason for LOA: as "Worker Compensation" not medical. They promised a year under Workers' Compensation.

The policy for "Acceptable Absence : Absences for jury duty, military leave, bereavement, disability due to a work related injury (Workers Comp) LOA, disability due to accident or illness covered under the medical LOA and provisions covered under the Family Medical Leave Act (FMLA)." Includes a "Disciplinary Action for Attendance Policy Violations: 1st Occurrence; No Action...4th Occurrence, No Action, 5th Occurrence Verbal Warning and 6th Occurrence Written Warning" Petitioner did not receive

any warning concerning the Acceptable Absence not being followed. Respondents did not follow their own policy and can't take a section of policy as a reason, and ignores another policy.

The Respondents reported to EEOC under Discovery No. 000005 and No. 54-8, pg 2of 12: "After completion of twenty-six (26) weeks of approved medical leave, Ms. Hamilton was eligible to apply for long term disability. Ms. Hamilton's approved leave began on September 15, 2005. Under our policy Ms. Hamilton was subject to termination on or around March 15, 2006. Her compensation and benefits were extended an additional three months (6/29/06). At that time Ms. Hamilton was terminated and applied for long term disability and was approved on August 25, 2006. Long term disability benefits were retroactive to March 15, 2006." This is an **adverse action before termination.**

Please review Whistle Blowing to public official: Petitioner Hamilton experienced much pain in her right wrist and hand during physical therapy for her right torn rotator cuff and was diagnosed with Carpal Tunnel Syndrome in **May 2006**. After having been diagnosed the Respondents refused treatment, to avoid reporting a second body part or second Workers' comp. claim. Respondents stopped Workers' Comp. income on **June 7, 2006;** confirmed on No. 96-5, Page 2 of 4.[3] Petitioner disagreed and sent a fax to the Commissioners' office disputing the reason and provided detail information about the many adverse actions perceived.

Petitioner also faxed a copy to Respondents on **June 20, 2006** again asking for LTD income; Respondents became furious, because the Petitioner had typed on the bottom of the fax, **cc: NAACP President.** The Respondents scheduled

[3] C.A. No. 2:07-2782-WCCFile # 0514475 and WC555-774834.

a meeting with Petitioner after receiving the fax to complete the filing process for LTD; instead they terminated the Petitioner in that meeting on **June 29, 2006; nine days after the fax to the Commissioner's office.**

II **Question number three of the "Writ of Certiorari":**

3. Whether the Court of Appeals erred by dismissing multiple appeals for not being timely when the appeals were filed in less than 30 days of the final "Denied" Order in accordance to Federal **Rule 54.**

Because two judgments were entered prior to the required 10 day grace period under the Bankruptcy Stay no Final Judgment is now valid in the district court. Federal Rule of Civil Procedure **54(b)** should allow one to appeal with the last Order entry #97 denying #96 Motion for Reconsideration. Petitioner filed multiple Appeals timely; less than 30 days after the "DENIED" Order was issued on 08/13/2009 Entry #97, and the Notice of Appeal was filed on 08/31/2009; Doc. No. 99, Notice of Appeal.

III **Question number four of the "Writ of Certiorari" is listed below:**

4. Whether the Court of Appeals and District Court erred by not reversing a Counter Claim under pursuant to **Rule 41** after plaintiff's request; when many adverse actions under "Abuse of Process," and pretexual retaliation to a workers' compensation claims were provided. **Procedural Error and or Abuse of Process with multiple appeals; it appears the appeals were ignored.**

Petitioner appealed: "Issue Number 7. Date Filed 02/10/2009 Entry Number 82 Page 1 of 17, "For the reason set herein, the court grants Defendants' Motion for Summary Judgment and adopts the Magistrate Judge's R&R into this Order."

Petitioner Appealed: "Issue Number 2: Date Filed 08/11/2009 Entry Number 96-2 Page 3 and 4 of 4: Chapter

11 Case No. 09-12795 (SMB) Jointly Administered):" ORDER GRANTING HAMILTON MOTION FOR RELIEF FROM AUTOMATIC STAY TO ALLOW APPEAL."

Misconduct by the prevailing party was presented: The Discover process was miss-used and abused. Entry No. 30 page 4 of 8 confirms Discovery was over, or "8. Discovery shall be completed no later than **April 8, 2008**." Yet, to file a counterclaim against the Petitioner, the Respondents created a document deliberately leaving off part of the income the Petitioner received was for vacation. The Respondents submitted a document as if it were part of the discovery dated **6/26/08**; Entry No. 63-3, page 2 of 2, and the date is on the document 3 times for a false law suit.

Respondents claim Petitioner agreed to dismissal, contrary to fact.

Proof of Service was deliberately ignored – not providing a copy of the Bankruptcy Order Lifting the Stay; oppressing the Petitioner preventing a Motion with the district Court within ten days.

IV. Question number five of the "Writ of Certiorari":

5. Whether the District Court committed an abuse of discretion by denying motion for reconsideration, without reasons, that confirmed an earlier disputed material fact in the magistrate judge report, objective evidence the court erred by accepting Judicial Estoppel, and an Order lifting the bankruptcy stay.

Applicable standard for reviewing summary judgment motion is unambiguously stated in **Rule 56 (C)** of Federal Rule of Civil Procedure: Many Material facts were given by Petitioner on 06/20/2008 via an **affidavit.**

According to **Rule 6(d)** of Federal Rules of Civil

Procedures an affidavit could be introduced. The Petitioner introduced "Plaintiff's Affidavit In Opposition To Defendant's Motion for Summary Judgment" under No. 54-3, page 1 - 7 of 7 with **many material facts**; # 20. I was informed that a lost time accident would not happen; # 32. That as a result of the accident I suffered from a disability; # 33. That after the accident to insure that I was able to do my position without pain; I requested a headset for less than $100.00 to hook to my telephone. # 34 That the Defendant failed and refused to accommodate my requests for the headset; # 36. That in Chaplin's affidavit, Mr. Chaplin falsely represents that the Defendant provided an employee for moving and opening boxes for me. # 37. That the Defendant did not provide me with any employee to do so; #44. That the Defendant intentionally delayed my treatment and caused me substantial pain by those delays; # 51. That my Doctor nor I requested that the Defendant put me on medical leave in September 2005; #58. That David Chaplin informed me that it would be a year before I had to worry about my job; # 61. That on October 20th, 2005, I sent Mr. Chaplin an email asking about my benefits and income prior to LTD and "if Mark IV or Dayco Products provided any immediate "short term salary" income to me while being out of work on Workers Comp." Exhibit 1; #62 That even though I was provided some income the Defendant had me write them a check every month for my benefits because they refused to remove from the check they were providing to me; # 64. But because the Defendant failed to accommodate my injury and my disability I suffered from a great deal of pain at the end of my employment with the Defendant; # 76. That I was attempting to get Long Term Disability; #77. That Gail called me to come down to the plant to fill out the paperwork for Long Term Disability; # 78. That Human Resources at that time stated to me "you are still not able to come back to work after being disabled for nine months." #79. That while I was there Gail and David called me into the office and informed me that I was terminated because I

had exceeded the 26 weeks. # 82. That at that time I told David I was going to call Corporate; # 83. That David informed me Corporate was already aware of it. # 85.That the Defendant terminated me without the benefit of Dayco's policies and procedures regarding attendance. # 86. That at no point and time was I informed that I would be terminated if I did not return to work within 26 weeks; # 87. That during my employment I was a salary employee; # 88. That as a result of leave of absence the Defendant had the benefit of a cost reduction against the bottom line. # 89. That in David's affidavit he misrepresents the dates that my Long Term Disability was approved. *Exhibit 10.* # 90. Nine days after Petitioner's complaint was filed with the Workers' Compensation Commission she was terminated.

Petitioner's Affidavit contains several material facts that ignored or never addressed by district court judge; Summary Judgment should have been in favor of the Petitioner by law.

"**Motion for Reconsideration**" Motion requesting relief from dismissal and Relief from Summary Judgment Orders and Requesting Claims be remanded, contained objective evidence addressing many of the above **material facts.** This motion also contained newly discovered evidence under **Rule 59**(b) and (e), also, an Order from the bankruptcy judge, lifting the Automatic Stay, and information confirmation judicial estoppel should not have been granted, because the Petitioner did not complete an application with Social Security until weeks after she was terminated. So, no prior Social Security lawsuit existed before termination to compare for inconsistent information.

Judicial Estoppel disputed material facts: "See Date Filed 09/11/2008, Entry Number 74 Page 12 of 13." Petitioner did not file an application until **July 13, 2006**

and they used the date the Plaintiff asked for an appointment as the file date **(June 29, 2006)**. "MOTION FOR RECONSIDERATION", Date Filed 08/11/2009 Entry No. 96 Page 1 thru 5;" Included confirmation from Social Security, No. 96-3, page 2 of 2.

Petitioner Hamilton believed because of the many errors though out the Magistrate Report and Summary Judgment Order, the only way to get the judge to see discriminatory false information was to include actual documents proving material facts from other sources and new evidence, but adverse action continued. Federal **Rule 72** did not apply to Motion for Reconsideration after submitting additional information. Request to accept Order lifting bankruptcy did not warrant a specific written objection.[4]

The judge may have had the right to deny the Motion for Reconsideration, plus, he denied the Petitioner's affidavit, but the Petitioner deserved Summary Judgment in her favor by law, and a report addressing why he denied the motion, not just "DENIED." These are procedural issues with the court. These issues become another split or conflicting decisions from other Courts of Appeals.

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[4] The Federal Magistrate's Act provides that a district court, when reviewing a magistrate judge's report and recommendation, "**shall** make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made" and "may also receive further evidence." 28 U.S.C.A § 636(B)(1) (West 2006) (emphasis added); see also Doe v. Chao, 306F.3d 170, 183 n.9 (4th Cir. 2002). We review the district court's refusal to accept new evidence following a magistrate judge's report and recommendation for abuse of discretion. See Doe, 306 F.3d at 183 (citing United States v. Howell, 231 F.3d 615, 622-23 (9th Cir. 2000) (reviewing for abuse discretion a district court's refusal to permit the production of new evidence following a magistrate judge's ... sue letters which were submitted along with his objections to the magistrate judge's report and recommendation."

CONCLUSION

The Respondents in Opposition to the Writ of Certiorari even submitted many false statements to The US Supreme Court; please audit the system. If this is the way southern blacks are treated by the legal system; it is wrong. Attorneys and employers are aware most people can not afford justice, a very few can even get to the US Supreme Court, plus most are denied. The system is not working for the people.

Many compelling reasons exist in Petitioner's claims confirming multiple acts of discrimination. Procedural and Due Process errors took place in the courts so obviously with reference to the appropriate standard for reviewing facts found in constitutional cases. The 4th Circuit did not take into consideration the appeals in the Petitioner's claims. Justice is needed, it's been over five years of torture after the accident of May 20, 2005, Petitioner prays you will consider the statues of limitations and this Court grant an Order in her favor, now instead of only sending her back in the "Lions Den." Please vacate the Orders in the district court and 4th Circuit of Appeals. Please schedule a hearing or issue your Order. Please grant Petitioner Hamilton's claims, she is trusting in GOD for all the foregoing reasons; petitioner respectfully prays the court will grant her Petition for Rehearing.

Respectfully submitted,

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October 22, 2010

Certificate of Counsel

Petitioner is (unrepresented by counsel) and had to file **Pro Se,** I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay, and under **Rule 44.1.**

/s/ Gertrude C. F. Hamilton
Petitioner Pro Se -represented